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Pleading--Statute of Limitations--Relation Back of an Amendment Changing the Defendant

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hearings along with other circumstances which cause the Court to award custody. Then when custody is determined, the custodian should normally be left free to decide in what religious faith the child will be raised. The court's duty would be fulfilled by considering whether any religious training would be made available to the child and the importance of a particular kind of religious training in relation to the other circumstances of the case.

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PLEADING—STATUTE OF LIMITATIONS—RELATION BACK OF AN AMENDMENT CHANGING THE DEFENDANT—Plaintiff brought an action against the individual members of the Harlan County Board of Education, alleging that he was injured by the gross negligence of a truck driver who was an employee of the board acting within the scope of his employment.[1] After the defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted, plaintiff amended his complaint making the Harlan County Board of Education defendant.[2] However, the amendment was made more than one year after the alleged injury.[3] The circuit court dismissed the original complaint for failure to state a claim upon which relief could be granted and dismissed the amended complaint as barred by the statute of limitations. Plaintiff appealed to the Court of Appeals of Kentucky. *Held:* Affirmed. *Gilbert* v. *Harlan County Board of Education,* 309 S.W.2d 771 (Ky. 1958).

County boards of education in Kentucky are quasi municipal corporations.[4] Members of a county board of education are individually liable for tort injuries resulting (1) from their failure to perform a specific ministerial act involving no discretion which is expressly required by statute and (2) from their failure to exercise ordinary care to employ a person qualified to perform the work for

[1] The defendants in the original complaint were named as follows:
> "James Green, (the truck driver) James Cawood, Supt. Carson Coleman, Board Member, Paul Graham, Board Member, Caleb Creech, Board Member, Dr. S. H. Rowland, Board Member, J. S. Hensley Board Member of the Harlan Educational Board."

Gilbert v. Harlan County Board of Education, 309 S.W. 2d 771 (Ky. 1958).

[2] The amended complaint designated the defendants as follows:
> "Harlan County Board of Education Consisting of James Cawood, Supt. and Carson Coleman, Paul Graham, Caleb Creech, Dr. S. H. Rowland, J. S. Hensley Board Members."

Id. at 771-72.

[3] The Statute of Limitations for such actions is one year. Ky. Rev. Stat. sec. 413.140(a) (1956).

[4] "Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued. . . ." Ky. Rev. Stat. sec. 160.160 (1956). See also, Board of Education of Kenton County v. Talbott, 286 Ky. 543, 549, 151 S.W. 2d 42, 45 (1941).

which he is hired.[5] Although plaintiff's original complaint could conceivably have stated a claim under the second theory, the Court of Appeals affirmed the decision of the circuit court dismissing the original complaint for failure to state a claim. On the other hand, it is well established in Kentucky that a county board of education is not liable in tort for injuries inflicted while exercising a governmental function.[6] The amended complaint was not dismissed on this ground. The Court of Appeals stated:

> The defendants in the amended complaint differed from those in the original complaint. The action against the parties named in the amended complaint was instituted more than one year following the date of the alleged injury. The Statute of Limitations was a bar to an action against the parties named in the amended complaint.[7]

The scope of this comment is limited to the problem of the relation back of an amendment which changes the defendant from an individual to a corporation or vice versa.

Rule 15.03 of the Kentucky Rules of Civil Procedure states the principles for determining whether an amendment relates back to the date of the original pleading for the purpose of avoiding the statute of limitations. The rule provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.[8]

In interpreting the identical federal rule, the federal district court in *Sanders* v. *Metzger* stated the rule governing amendments which change the name of the defendant:

> If the effect of the proposed amendment is merely to correct the name of a party already in court, clearly there is no prejudice in allowing the amendment, even though it relates back to the date of the original complaint.
>
> On the other hand, if the effect of the amendment is to substitute for the defendant a new party, such amendment amounts to a new and independent cause of action and cannot be permitted when the statute of limitations has run. (citations omitted)[9]

Although this rule is easily stated, it is quite often difficult to apply to particular fact situations. When a plaintiff has sued an individual

[5] Whitt v. Reed, 239 S.W. 2d 489, 491 (Ky. 1951) (dictum); Kirkpatrick's Adm'x (Bronaugh) v. Murray, 294 Ky. 715, 718, 172 S.W. 2d 591, 593 (1943).

[6] Whitt v. Reed, 239 S.W. 2d 489, 490 (Ky. 1951); Thacker v. Pike County Board of Education, 301 Ky. 781, 193 S.W. 2d 409 (1946); Wallace v. Laurel County Board of Education, 287 Ky. 454, 153 S.W. 2d 915 (1941).

[7] Gilbert v. Harlan County Board of Education, 309 S.W. 2d 771, 772 (Ky. 1958).

[8] Ky. R. Civ. P. 15.03 adopts verbatim Fed. R. Civ. P. 15(c). For the rule governing the amendment of any summons or proof of process, see Ky. R. Civ. P. 4.16, which is substantially the same as Fed. R. Civ. P. 4(h).

[9] 66 F. Supp. 262, 263 (E.D. Pa. 1946).

and amends his complaint to make a corporation the defendant (or vice versa), it is not surprising to find that the Courts have not reached uniform results.

Prior to the decision in the *Gilbert* case, the Court of Appeals of Kentucky had consistently held that an amendment which substituted an individual or partnership for the corporation named in the original pleading did not relate back to the date of the original pleading.[10] As in the *Gilbert* case, the Court reasoned that the amendment stated a new cause of action against parties not previously before the court; hence, the original pleading did not bar the new defendants from relying upon the statute of limitations. The Court of Appeals distinguished these cases from those in which the amendment merely corrected a misnomer in the name of a party already before the court.[11] Possibly a majority of state courts[12] as well as a number of federal courts[13] have adopted this view.

In many cases, however, a strong argument can be made for the view that such amendments merely correct a misnomer in the name of a party already before the court. The plaintiff seeks to sue a particular business entity, but he may be mistaken as to whether the business entity is individually owned or incorporated. As the Supreme Court of Pennsylvania pointed out:

> The word 'company', when used as part of a name of a business enterprise reasonably suggests a corporation, and the public logically assumes, having no notice to the contrary, that it is a corporation. Where a private individual uses 'company' as a fictitious name, he may deceive the public whether he intends to do so or not.[14]

The business entity approach had led some courts to conclude that an amendment changing the name of the defendant does relate back to the date of the original pleading on the theory that the amendment does no more than correct a mistake in the characterization of the original defendant, i.e., the business entity.[15]

[10] Lingar v. Harlan Fuel Co., 298 Ky. 216, 182 S.W. 2d 657 (1944); Nunn v. City of Louisville, 31 Ky. L. Rep. 1293, 105 S.W. 119 (1907); Geneva Cooperage Co. v. Brown, 124 Ky. 16, 98 S.W. 279, 124 Am. St. Rep. 388 (1906); Leatherman v. Times Co., 88 Ky. 291, 11 S.W. 12, 3 L.R.A. 324, 21 Am. St. Rep. 342 (1889).

[11] The Court of Appeals of Kentucky in Imperial Jellico Coal Co. v. Neff, 166 Ky. 722, 179 S.W. 829 (1915), held that an amendment changing the defendant's name from "Imperial Coal Co." to "Imperial Jellico Coal Co." related back to the date of the original complaint so as to bar the plea of the statute of limitations.

[12] See, annot., 8 A.L.R. 2d 6, 166 (1949).

[13] E.g., Kerner v. Rackmill, 111 F. Supp. 150 (M.D. Pa. 1953).

[14] Waugh v. Steelton Taxicab Co., 371 Pa. 436, 89 A. 2d 527, 528 (1952).

[15] Evans v. List, 193 Ark. 13, 97 S.W. 2d 73 (1936); Cabot v. Clearwater Construction Co., 89 So. 2d 662 (Fla. 1956); Waugh v. Steelton Taxicab Co., 371 Pa. 436, 89 A. 2d 527 (1952); annot., 8 A.L.R. 2d 6, 171 (1949).

A comparison of two cases from different jurisdictions will illustrate the justice of the "entity" approach. In *Lingar* v. *Harlan Fuel Co.*,[16] the plaintiff brought an action against the "Harlan Fuel Company, a corporation" to recover for injuries sustained while in its employ. In fact, the corporation had been dissolved only three months prior to the plaintiff's injury, and the business had been carried on by a partnership under the same name. After the one year statute of limitations had run, the plaintiff attempted to amend his complaint making the partnership and the individual partners defendants. The Court of Appeals of Kentucky held that the amendment did not relate back to the date of the original complaint and was, therefore, barred by the statute of limitations. In *Cabot* v. *Clearwater Construction Co.*,[17] the action was against the "Clearwater Construction Company, a corporation." The summons was served upon Snyder, who was the sole owner of the business which was not incorporated. After the statute of limitations had run, the plaintiff amended his complaint to substitute as defendant "Snyder, doing business as Clearwater Construction Company." The Supreme Court of Florida held that the amendment related back to the date of the original complaint so as to avoid the statute of limitations. In both cases, the defendant had notice of plaintiff's claim from the outset, but in the *Lingar* case, a technical error in pleading was permitted to defeat an apparently meritorious claim. As stated by Justice Holmes:

> [W]hen a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and . . . a liberal rule should be applied.[18]

Assuming the validity of the "entity" approach, it is still apparent that an amendment may bring in a new party rather than correct a misnomer in the description of an entity when the amendment substitutes a corporation for individual defendants as in the *Gilbert* case. A subjective test is unworkable since only the most naive pleader would admit that he had sued the wrong party.[19] Professor Moore states:

> The test should be whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and

[16] 298 Ky. 216, 182 S.W. 2d 657 (1944).
[17] 89 So. 2d 662 (Fla. 1956).
[18] New York Central & Hudson River R.R. Co. v. Kinney, 260 U.S. 340, 346 (1922). See also, Clay, Kentucky Civil Rules 195 (1954); Godfrey v. Eastern Gas & Fuel Associates, 71 F. Supp. 175, 178 (D. Mass. 1947).
[19] Cf., Glint Factors, Inc. v. Schnapp, 126 F. 2d 207, 210 (2d Cir. 1942) (concurring opinion by Judge Clark).

> actually served the entity or person intended; or whether plaintiff actually meant to serve and sue a different person.[20]

Applying this test to the facts in the *Gilbert* case, it is probable that the plaintiff intended to sue the individual members of the school board rather than the board as an entity. There are no facts from which it can be inferred that the plaintiff was under the misconception that the board was not a corporation. Therefore, the effect of the amendment was to bring in a new party, and the Court of Appeals of Kentucky was correct in holding that the statute of limitations was a bar to the amended complaint.

Although the decision in the *Gilbert* case appears sound, it is hoped that the Court of Appeals of Kentucky will not follow the line of cases represented by *Lingar* v. *Harlan Fuel Co.* All of those cases were decided prior to the adoption of Rule 15.03 of the Kentucky Rules of Civil Procedure. Hence, the Court of Appeals should feel free to adopt the position of the Florida Supreme Court in *Cabot* v. *Clearwater Construction Co.* since that case involved the interpretation of a rule which is identical with Kentucky Rule 15.03.[21]

James Park, Jr.

TORTS—BLASTING—STRICT LIABILITY FOR CONCUSSION DAMAGE—Plaintiff, a landowner, brought an action against the City of Nicholasville and Aldredge-Poage, Inc., a construction company, for damage to her house and outbuildings resulting from blasting. The blasting was done by the company pursuant to its contract with the city to construct a water line from the Kentucky River to Nicholasville over a right-of-way furnished by the city.[1] Plaintiff alleged trespass damage from flying rocks, concussion and vibration, and negligence on the part of the construction company and received a judgment for $10,200 against both defendants on verdicts of $200 for the trespass damage and $10,000 for damages resulting from negligence. Held: Judgment against the city affirmed; judgment against the construction company affirmed as to the trespass, reversed as to the negligence. Since plain-

[20] 2 Moore, Federal Practice sec. 4.44, at p. 1042 (2d ed. 1948). See also, Wagner v. New York, O. & W. Ry., 146 F. Supp. 926 (M.D. Pa. 1956). For an excellent application of this test, see Sanders v. Metzger, 66 F. Supp. 262 (E.D. Pa. 1946).

[21] Fla. R. Civ. P. 1.15(c).

[1] The city was joined as defendant by reason of an easement obtained from the plaintiff in which the city covenanted to repair, or reimburse the landowner for, damage to the property resulting from the construction, repair, replacement or maintenance of the water line.